Case No. 80-1340

In the Supreme Court of the United States

OCTOBER TERM, 1980

The Honorable RICHARD D. LAMM, Governor of the State of Colorado; JAMES G. RICKETTS, Executive Director of the Colorado Department of Corrections; JOHN PERKO, Director of Adult Services of the Colorado Department of Corrections; EDGAR FOX, Director of the Division of Correctional Industries of the Colorado Department of Corrections; and WILLIAM WILSON, Superintendent of the Canon Correctional Facility,

Petitioners,

v.

FIDEL RAMOS, DAVID LEE ANDERSON, SADIKI LISIMBA AJAMU, (a/k/a Eugene Collins), ALEXANDER ROSES, MARK J. MENCHETTI, LESTER LASENBY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Brief of the States of Oregon, Alaska, Arizona, Delaware, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Louisiana, Missouri, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Washington, West Virginia and Wyoming and American Samoa In Support of Petition for Writ of Certiorari, Amici Curiae

DAVE FROHNMAYER
Attorney General of Oregon
JOHN R. McCULLOCH, JR.
Solicitor General
WILLIAM F. GARY
Deputy Solicitor General
JAMES E. MOUNTAIN, JR.
Assistant Attorney General
JAN PETER LONDAHL
Assistant Attorney General
100 State Office Building
Salem, Oregon 97310
Telephone: (503) 378-4402
Counsel for Amicus Curiae

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Draft 3/05/81 Docket No. 80-1340

AMICUS BRIEF

Amici respectfully pray that a writ of certiorari issue to review the judgment and opinion of the

United States Court of Appeals for the Tenth Circuit entered in this proceeding on September 25, 1980.

STATEMENT OF INTEREST

Amici are states which operate penal institutions as integral parts of the criminal justice system within their respective jurisdictions. In recent years, state prisoners have successfully obtained federal judicial review of a wide range of state prison conditions and correctional practices by asserting institution-wide violations of the Eighth Amendment prohibition of cruel and unusual punishment. Through their application of the Eighth Amendment, lower federal courts have become the ultimate arbiters of the adequacy of virtually every aspect of the criminal dispositional process, from classification and placement[1] to educational and rehabilitation programs.[2]. Because the federal courts are currently using a variety of tests to evaluate the constitutionality of institutional conditions, amici are unable to anticipate federal intervention and voluntarily conform their programs to constitutional standards.

This Court is presently considering the proper standard for application of the Eighth Amendment in the context of a prison overcrowding claim. *Rhodes v.*

[1] *See, eg, Palmigiano v. Garrahy*, 443 F. Supp. 956 (D.R.I. 1977) *remanded*, 599 F.2d 17 (1st Cir. 1979); *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976).

[2] *See, e.g., Battle v. Anderson*, 564 F.2d 388 (10th Cir. 1977); *Laaman v. Helgemoe*, 437 F. Supp. 269 (D.N.H. 1977).

Chapman (No. 80-322). The broader range of the lower courts' inquiry in this case provides an appropriate vehicle for the Court to expand the scope of its consideration and to provide both the lower courts and the states with a more thorough explication of the proper Eighth Amendment standard for review of prison condition challenges.

ARGUMENT

This is a class action in which the plaintiffs proceeded on behalf of all persons confined at the maximum security unit of the Colorado State Penitentiary (Old Max). The plaintiffs challenged a wide variety of conditions of confinement and correctional practices at Old Max, primarily on the ground that they constituted cruel and unusual punishment in violation of the Eighth Amendment.[3] The District Court[4] considered the age, deterioration, and general architectural inadequacy of the physical plant, 485 F. Supp. at 133-137, (A-62-70), inmate idleness and isolation, 485 F. Supp. at 137-138, (A-70-72), inadequate employment, educational and recreational opportunities, 485 F. Supp. at 139-140, (A-72-76), poor security, medical care and inmate classification, 485 F. Supp. at 140-

[3]In addition to their Eighth Amendment claims, plaintiffs challenged policies at Old Max relating to visitation, correspondence, and access to the courts. These issues were joined and disposed of on First Amendment grounds and apparently played no role in the Court's Eighth Amendment analysis.

[4]The District Court's opinion is reported as *Ramos v. Lamm*, 485 F. Supp. 122 (D. Colo. 1979).

150, (A-76-94), and concluded that "the overall effect is to create conditions . . . that make degeneration likely and self-improvement impossible." 485 F. Supp. at 156, (A-105). On that basis, the district court held that "members of the plaintiff class have suffered denials of due process and the infliction of cruel and unusual punishment. . . ." 485 F. Supp. at 169, (A-130). To remedy this perceived across-the-board Eighth Amendment violation, the court ordered closure of Old Max.

The Court of Appeals for the Tenth Circuit approved the constitutional standard applied by the District Court, upheld most of its factual findings, and remanded the case "for further proceedings in light of changed conditions and this opinion." (A-48).

In many respects, this case presents the same issues now before this Court in *Rhodes v. Chapman* (80-322). As in *Rhodes,* the federal courts in this case have ordered sweeping changes in Colorado's correctional system on the basis of one of a variety of highly subjective lower federal court standards for evaluating Eighth Amendment claims in the context of class action prison condition lawsuits.[5] As in *Rhodes,* the

[5] *See, e.g. Hite v. Leeke,* 564 F.2d 670 (4th Cir. 1977) (Evolving Standards of Decency); *Nadeau v. Helgemoe,* 561 F.2d 411 (1st Cir. 1977) (Evolving Standards of Decency and Shocking to the Conscience); *Gates v. Collier,* 501 F.2d 1291 (5th Cir. 1976) (Evolving Standards of Decency and Totality of Circumstances); *French v. Hayne,* 547 F.2d 994 (7th Cir. 1976) (Shocking to the Conscience and Totality of Circumstances); *Crowe v. Leeke,* 540 F.2d 740

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courts here have ignored the historical and linguistic roots of the term "cruel and unusual punishment"[6] and, in doing so, have converted the minimum standard embodied in the Eighth Amendment into a jurisdictional base from which to impose apparently unreviewable architectural and penological standards upon the states. The exercise of this Court's jurisdiction is appropriate in this case to ensure that its ultimate disposition will be consistent with whatever constitutional guidelines are established in *Rhodes v. Chapman.* There are, however, more far reaching reasons for granting certiorari in this case. Apart from the categorical similarities between the issues in this case and those presented in *Rhodes,* there are important differences between the cases which make *Lamm v. Ramos* a logical companion case or sequel.

Lamm v. Ramos is a Totality of the Circumstances Case

In *Rhodes,* the district court found an Eighth Amendment violation based solely upon an inmate census which was 38% above the design capacity of the prison. *Chapman v. Rhodes,* 434 F. Supp. 1007 (S.D.

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(4th Cir. 1976) (Shocking to the Conscience and Balancing Test). One commentator has identified five separate tests which are now being employed by federal district courts. Fair, *The Lower Federal Courts as Constitution-Makers: The Case of Prison Conditions,* 7 Am. J. Crim. Law 119, 124 (1979).

[6]For a discussion of the language and history of the Eighth Amendment and their interpretive impact, see Brief of the State of Oregon and thirty three other states in support of petitioners, *Rhodes v. Chapman* (80-332) at pp. 6-10, 15-18.

Ohio, 1977). In this case, overcrowding played no part in the ultimate constitutional conclusion.[7] The finding of cruel and unusual punishment was truly based upon the "totality of the circumstances." The district court lumped together perceived inadequacies in physical facilities, medical care, and rehabilitation services to find an aggregate constitutional violation. It did not alter its analysis with respect to conditions or services, such as inmate classification, which even it conceded were not constitutionally mandated.

Although many prison condition lawsuits decided by the lower federal courts focus primarily or exclusively on the problems of overcrowding or "double celling", *see, e.g., Capps v. Atiyeh,* 495 F. Supp. 802 (D. Or. 1980), the typical class action challenge to prison conditions encompasses a broad spectrum of issues. *See, e.g., Newman v. Alabama,* 559 F.2d 283 (5th Cir. 1977); *Battle v. Anderson,* 564 F.2d 388 (10th Cir. 1977). In the ten years since a federal court declared that the entire Arkansas prison system violated the Eighth Amendment prohibition of cruel and unusual punishment,[8] the lower federal courts have increas-

[7]Neither the district court nor the Tenth Circuit opinions mention crowding as a problem at Old Max. The record demonstrates that it is not. Even one of the plaintiffs' experts freely admitted that "overcrowding is not one of the questions here." (R. Vol. 21 at 59).

[8]The protracted litigation involving the Arkansas prison system is found in the following cases:

Talley v. Stephens, 247 F. Supp. 683 (E.D. Ark. 1965); *Jackson v. Bishop,* 268 F. Supp. 804 (E.D. Ark. 1967), *vacated,* 404 F.2d 571 (8th Cir. 1968);

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ingly relied upon the holistic "Totality of the Circumstances" approach. *See, e.g., Johnson v. Levine,* 588 F.2d 1378 (4th Cir. 1978); *Williams v. Edwards,* 547 F.2d 1206 (5th Cir. 1977); *French v. Hayne,* 547 F.2d 994 (7th Cir. 1976); *Sweet v. South Carolina Dept. of Corrections,* 529 F.2d 854 (4th Cir. 1975); *Gates v. Collier,* 501 F.2d 1291 (5th Cir. 1976); *Finney v. Arkansas Bd. of Corrections,* 505 F.2d 194 (8th Cir. 1974). The formula has become so ingrained that even the court in *Rhodes* invoked it, *Chapman v. Rhodes, supra* at 1019, although the court's factual findings make it clear that the issue in that case is overcrowding. Because the scope of the issues is so much broader in this case than in *Rhodes,* it provides an appropriate vehicle for this Court to address the special problems of the "Totality" prison condition suit.

Amici submit that there is nothing inherently fallacious about the totality analysis but, in its application, it has become grossly distorted.[9] When it

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Courtney v. Bishop, 409 F.2d 1185 (8th Cir. 1969); *Holt v. Sarver,* 300 F. Supp. 825 (E.D. Ark. 1969); *Holt v. Sarver,* 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd,* 442 F.2d 304 (8th Cir. 1971); *Holt v. Hutto,* 363 F. Supp. 194 (E.D. Ark. 1973) *aff'd in part and reversed in part sub nom Finney v. Arkansas Bd. of Corrections,* 505 F.2d 194 (8th Cir. 1974); *Finney v. Hutto,* 410 F. Supp. 251 (E.D. Ark. 1976), *aff'd,* 548 F.2d 743 (8th Cir.1977, *aff'd.* 437 U.S. 678 (1978).

[9]In an amicus curiae brief in *Rhodes v. Chapman,* 34 states argued that a standard more closely associated with the history and language of the Eighth Amendment is, for a variety of reasons, to be favored. The *Chapman* amici advocated a standard that inquires whether the particular prison condition inflicts the requisite quality and quantity of pain. The *Chapman* amici did not undertake to identify precise criteria for the ascription of pain. However, they maintained that the pain that is most appropriately as-

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originated in the Arkansas prison cases, it was applied to conditions which plainly violated any understanding of the Eighth Amendment. Gradually, however, the formula has evolved to the point where, through it, federal courts have become "front line agencies for the consideration and resolution of the infinite variety of prisoner complaints." *Procunier v. Martinez,* 416 U.S. 396, 405 n. 9 (1973)

The totality approach has enabled the lower federal courts to "remedy" a wide range of conditions which are not, in themselves, of constitutional dimension. An analysis of the totality, including subjective impressions which cannot be measured, makes it possible for the whole to be greater than the sum of its parts. Of equal importance, the totality approach, as it is currently applied, significantly expands the intrusiveness of the remedy which a federal court feels constrained to impose.[10] The failure to identify any particular

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sociated with the phrase "cruel and unusual punishment" is severe. They also contended that, at a minimum, an Eighth Amendment claim should require a showing that sharp or acute pain is being gratuitously inflicted. Whatever kind of pain is required, so long as it is consistent with the ordinary language usage of the term, it makes little sense to talk about the "totality of the circumstances" causing pain. It is difficult to construct a hypothetical in which three circumstances in the aggregate cause pain, but no one of these circumstances would do so individually. If some form of traditional analysis for the Eighth Amendment is adopted, a "totality of the circumstances" approach has no place in it.

[10] "Yet, because he used the 'totality of the conditions' approach, which bases the right to relief on a conglomeration of 11 considerations, Chief Judge Johnson was *forced* into adopting a remedy that responded to all 11 considerations—a remedy that inevitably would be far reaching. It may be ironic, nonetheless, that inmate-plaintiffs, who are

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violation of the Eighth Amendment leads to a generalized intrusion on the functioning of the state bureaucracy. The conclusion that the whole institution is unconstitutional leads to the apparent corollary that the whole institution must be remedied, or as in this case, closed and, presumably replaced. The broad remedies that seem impelled by the breadth of the constitutional standard are highly intrusive and quite unnecessary. If individual conditions comprise the offending totality, then individual conditions should be remedied; and the remedy should be tailored to achieve a constitutionally minimum set of conditions.

The Court should address these problems inherent in the class action[11] structural reform lawsuit and, if

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unable to make out a constitutional cause of action based on any one prison condition in effect may receive the same relief as if they had made out and *succeeded* on 11 such claims; it only adds to the irony that such inmates also may be entitled to a plethora of remedies that require significantly more intensive and constitutionally less obvious forms of federal court supervision over state agencies than the remedies available under any one such claim would require." Robbins and Buser, Punitive Conditions of Prison Confinement: An Analysis of *Pugh v. Locke* and Federal Court Supervision of State Penal Administration Under the Eighth Amendment, 29 Stan. Law Review 893, 920 (1977).

The wider remedy is not, of course, "forced." Judge Johnson could have chosen, for example, to remedy a select group of conditions in order to reduce deleterious conditions to a constitutional minimum.

[11]The generalized nature of class action prison condition claims necessarily precludes analysis of the method of punishment in terms of its suitability to the criminal conduct which prompted it. An institution such as Old Max may house a variety of offenders whose criminal conduct could justifiably engender a wide range of societal responses. When an Eighth Amendment violation is held to exist in a prison condition suit, the conditions are necessarily deemed to be an unacceptable punishment for any crime. Similarly, the class action shifts the focus away from actual privations. Some, but not all, inmates may be adversely affected by an "unconstitutional" condition. Thus, the constitutional conclusion is not that cruel and unusual punishment *is* being administered but that an institution is *capable* of imposing cruel and unusual punishment.

Rhodes v. Chapman is not an appropriate case in which to do so, this case clearly is.

Lamm v. Ramos Presents an Opportunity To Review the Broadest and Most Subjective Of The Current Lower Federal Court Tests

The non-reviewable subjectivity, expansiveness and remedial intrusiveness of the Totality of the Circumstances analysis is largely attributable to the substantive Eighth Amendment standard for evaluating prison conditions with which it is linked. From the outset, most courts have evaluated overall prison conditions in terms of "the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles,* 356 U.S. 86, 100-01 (1958). *See e.g., Williams v. Edwards, supra; French v. Heyne, supra.* However, the non-analytic nature of this hortatory concept has resulted in its further explication by reference to conditions deemed to "shock the conscience." *See e.g., Williams v. Edwards, supra; Sweet v. South Carolina Dept. of Corrections, supra.* It is through the application of these imponderable criteria, without reference to the concept of cruel and unusual punishment which they purport to clarify, that the Eighth Amendment has become a federally enforced correctional ideal.[12]

[12] ". . . [T]he normative criteria that emerge in complex enforcement, though not *compelled* by the eighth amendment, represent a body of 'constitutionally inspired implementing rules' that render more concrete the vague Eighth Amendment prohibition. These criteria both

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As these subjective standards have been applied to the totality of the circumstances in prison after prison, the remedial responses to perceived constitutional deficiencies have gradually become identified as independent substantive rights. Thus, for example, the minimum square footage of cell space, per inmate, recommended by the American Public Health Association or the American Correctional Association have been held to be the constitutional minimum. *Battle v. Anderson, supra,* 564 F.2d at 395; *Battle v. Anderson,* 447 F. Supp. 516, 525 (E.D. Okla. 1977). In fact, in this case, the district court specifically relied upon American Correctional Association standards in holding that 80 square feet per inmate was the constitutional minimum. (A-102). *But see, Bell v. Wolfish,* 441 U.S. 520, 544 n. 27 (1979).[13]. Thus, as one commentator has recently observed:

> ". . .[A]s these affirmative requirements have become standard, they have ceased to be merely remedial responses to wrongs independently iden-

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structure judicial inquiry and facilitate 'self-regulating official behavior.' Thus, through repeated remedial efforts, courts in effect construct a legal ideal of the prison against which they measure existing institutions." Note, Complex Enforcement: Unconstitutional Prison Conditions, 94 Harv. L. Rev. 626, 645 (1981).

[13]The obvious problems associated with the resort to sociological standards as constitutional minima are beyond the scope of this brief. They are, nevertheless, central to the proper resolution of the basic issue presented. Questions regarding the admissibility of such standards without the availability of cross-examination regarding their bases, the desirability of resort sociological data as a premise for constitutional adjudication and the conversion of the Eighth Amendment into an utopian ideal ought to be addressed by this Court.

tified. Rather, they occupy an ambiguous status. While they are not constitutional rights as such, they seem to represent the criteria of legality and therefore are more than mere remedies. The proliferation of various labels — 'remedial rights,' 'emergent rights,' and 'entitlement' — reflects this ambiguity.

"Whatever the label, however, these standard features now function as the more or less essential elements — the normative criteria — of an 'adequate' prison. The substantive inquiry no longer focuses on whether actual abuses suffered by inmates shock the conscience. Instead, it focuses on the substantial *risk* of harm to which inmates are exposed. The court asks whether the prison has met its 'affirmative duty' to provide reasonable safety and adequate medical care — in short, to operate a prison 'countenanced by the Constitution.' These standard remedial features comprise the criteria of what is reasonable, and thus define with specificity the prison's affirmative duties. A failure to meet them, without more, constitutes the violation. So, for example, a staff shortage and inadequate medical records, formerly viewed as causes of wrongful conditions, become themselves 'deprivations' violative of the eighth amendment." Note, Complex Enforcement, Unconstitutional Prison Conditions, 94 Harv L Rev 626, 640 (1981). (footnotes omitted.)

The transformation of highly intrusive remedies into substantive constitutional norms has culminated in the adaptation of the Eighth Amendment standard which was first articulated by the Tenth Circuit in *Battle v. Anderson* and which has been applied in this case. In *Anderson,* the Court observed, *in dicta*:

"We are guided by the fact that the United

> States Supreme Court has not wavered in its holding that the Eighth Amendment to the United States Constitution prohibiting imposition of cruel and unusual punishment is, inter alia, intended to protect and safeguard a prison inmate *from an environment where degeneration is probable and self improvement unlikely* because of the conditions existing which inflict needless suffering, whether physical or mental." 564 F.2d 388 (Emphasis added).

As the petition for writ of certiorari notes, this standard is in direct conflict with the rule first articulated by the Fifth Circuit in *Newman v. Alabama,* 559 F.2d 283, 291 (5th Cir. 1977), *cert denied,* 438 U.S. 915 (1978), which has also been adopted by the Second and Fourth Circuits. *Wolfish v. Levi,* 573 F.2d 118 (2d Cir. 1978), *rev'd in part on other grounds sub nom Bell v. Wolfish,* 441 U.S. 520 (1979); *Hite v. Leeke,* 564 F.2d 670 (4th Cir. 1977).

> "If the state furnishes its prisoners with reasonably adequate food, clothing, shelter, sanitation, medical care, and personal safety so as to avoid the imposition of cruel and unusual punishment, that ends its obligation under Amendment Eight." *Newman v. Alabama, supra,* 559 F.2d at 291.

Notwithstanding the Tenth Circuit's conclusion in this case that there is "no conflict between our decision in *Battle* and the Fifth Circuit's decision in *Newman*" (A-13), the differences in the standards and their propensity to usurp responsibility for the development of basic state correctional philosophy is obvious and

substantial. Until recently, the "degeneration" standard had not been applied outside of the Tenth Circuit. However, two of the most current district court prison cases, in Oregon and Washingtron, have expressly relied on the standard as their doctrinal basis. *Capps v. Atiyeh, supra; Hoptowit v. Ray,* — F. Supp. —— (E.D. Wash. July 22, 1980, D.C. No. 79-359).

The origin of the notion that the Eighth Amendment protects against degeneration or mandates an environment which fosters self-improvement is obscure. In *Battle v. Anderson, supra,* the Tenth Circuit cited *Estelle v. Gamble,* 429 U.S. 97 (1976) and *Gregg v. Georgia,* 428 U.S. 153 (1976) in support of its assertion that this Court "has not wavered" from such a holding. 564 F.2d at 393. Although these cases indicate that the Eighth Amendment focuses on the infliction of needless pain, they do not even remotely suggest that a nurturing environment is constitutionally required.[14]

It is generally recognized that the Eighth Amendment does not confer a right to rehabilitation. *See Newman v. Alabama, supra.* Paradoxically, the Tenth

[14] In *Newman v. Alabama,* 559 F.2d 283 (5th Cir. 1977), the United States Attorney General, appearing as Amicus Curiae, argued that states had a duty to protect against deterioration of the physical and emotional status of prisoners in their charge. 559 F.2d at 291. The court interpreted this as an argument that the state could not inflict cruel and unusual punishment "that would likely lead to such results," and then rejected the argument as thus interpreted. *Id.* The standard adopted in *Battle v. Anderson,* is essentially that which the court rejected in *Newman.* Significantly, the Attorney General appeared on behalf of the United States as Intervenor in *Battle v. Anderson.*

Circuit acknowledged as much in *Battle v. Anderson, supra,* while, at the same time, holding that prison conditions must not dilute the likelihood of self-improvement. Whatever meaning the term "cruel and unusual punishment" may have, according to society's evolving standards of decency, *see Trop v. Dulles, supra,* it should not be defined so broadly as to include any condition or circumstance which does not stimulate personal growth.

Both premises of the purported constitutional test for a finding of cruel and unusual punishment, as articulated in *Battle v. Anderson* and its progeny, are hopelessly inadequate. The first premise, that "degeneration is probable," confuses penology with gerontology. It disregards the inevitable physiology of the aging process[15] and it contains no internal limiting principle which would aid a court in distinguishing between the effect of confinement itself as a legally sanctioned deprivation of liberty and that type of confinement which is impermissible.

The second premise of the test, that "self-improvement is unlikely," is equally objectionable as a standard for constitutional jurisprudence. It singles out rehabilitation as the single formula for penology

[15] As the Fifth Circuit noted in *Newman v. Alabama, supra:*

"The mental, physical and emotional status of individuals, whether in or out of custody, do (sic) deteriorate and there is no power on earth to prevent it." 559 F.2d at 291.

despite the traditional freedom of states to choose a different correctional philosophy through their own democratic processes. It ignores the explicit statement of this Court that "the Constitution does not require that every aspect of prison discipline serve a rehabilitative purpose." *Hutto v. Finney,* 437 U.S. 678, 686 n. 8 (1978). It also flies in the face of modern research casting into question the degree to which "rehabilitation" can be achieved or coerced at all. *See, e.g.,* N. Morris, *The Future of Imprisonment,* 20-22, 35-36 (1974); A. Von Hirsch, et al, *Doing Justice* xix, 115 (1976).

Moreover, focusing on the likelihood of self-improvement fundamentally alters the fact-finding process in a prison condition case. The court must determine the adequacy of a correctional program in promoting self-improvement; a determination which is traditionally and properly the province of state officials. *See e.g., Procunier v. Martinez, supra.* The standard requires the court to make policy decisions as to what is, in its view, necessary to produce a correctional system which is, at least potentially, successful. However desirable such an objective be, there is no unanimity as to the means of attaining it. By constitutional decree, the district court short-circuits the political process by which "correctional philosophy" has always been forged. The state legislative and execu-

tive branches must necessarily determine the scope and direction of the correctional program in the give-and-take of the legislative process. Correctional experts are, of course, committed to the implementation of the latest programs, regardless of their cost. The legislature, on the other hand, must balance correctional needs, in light of the limited resources available, against the broad spectrum of other equally necessary state functions. Armed with a mandate to compel a nurturing environment, the federal courts would become a powerful ally to the executive. As Justice Rehnquist observed in granting a stay of the district court's injunction pending appeal in the Ninth Circuit in *Atiyeh v. Capps, supra:*

> "Naturally, penal officials would like to have a larger share of the State's budget, just as would any number of other state officials administering programs mandated by the State. But there is nothing in the Constitution that says that 'rehabilitation' is the sole permissible goal of incarceration, and we have only recently stated that retribution is equally permissible. See *Gregg v. Georgia,* 428 U.S. 153, 184, n. 30 (1976)." *Atiyeh v. Capps,* — US —— (1981, Rehnquist, J., *in chambers*) Sl. Op. at 3.

The degeneration standard is also defective because it is non-specific. Rather than focusing on articulable, quantifiable conditions which affect particular inmates, the standard turns on subjective, speculative impressions regarding the effectiveness of the

entire correctional system. Thus, for example, the court may rely on increased health risks, reduced availability of rehabilitation, reduced protection from assaults and an atmosphere of tension. It need not find that any inmate had been made ill, or excluded from a rehabilitation program, or subjected to unrestrained assault or made tense. Such specific findings are irrelevant when the inquiry is whether a system makes self-improvement unlikely because the test calls for generalized speculation rather than individual assessments. Equally important, the degeneration test is not subject to judicial proof in the same manner as are issues of historical fact. The test calls for a prediction as to future behaviors of a class of inmates which are, in the ultimate sense, unknowable. Yet disguised in the form of findings of fact, those predictions become virtually unreviewable by higher courts under normal standards of appellate review. As a consequence, the formula leaves the constitutional test for the adequacy of prison conditions subject to no understandable national norm.

In short, the test applied by the 10th Circuit is neither adequate, understandable or fair as a guide to those state legislatures and correctional officials who seek to conform their actions to constitutional standards. The basic flaw in the degeneration standard is that it assumes that the constitution mandates an

utopian ideal and forbids *any* suffering or inconvenience which is not directly related to reformation. Thus, all punishment becomes cruel and unusual. Diligent enforcement of the Eighth Amendment prohibition does not require such an inherently intrusive analysis and this Court should not endorse it.

CONCLUSION

For the reasons outlined above, the petition for writ of cetiorari should be granted.

Respectfully submitted,

DAVE FROHNMAYER
Attorney General
JOHN R. McCULLOCH, JR.
Solicitor General
WILLIAM F. GARY
Deputy Solicitor General
JAMES E. MOUNTAIN
JAN PETER LONDAHL
Assistant Attorneys General
Attorneys for Amicus Curiae
State of Oregon

baw

APPENDIX: LIST OF THE AMICI CURIAE

State of Alaska
Wilson L. Condon
Attorney General of Alaska
Pouch KC-State Capitol
Juneau, Alaska 99811

American Samoa
Aviata F. Fa'alevao
Attorney General of Am. Samoa
P. O. Box 7
Pago Pago, Amer. Samoa 96799

State of Arizona
Robert K. Corbin
Attorney General of Arizona
State Capitol
1700 W. Washington
Phoenix, Arizona 85007

State of Delaware
Richard S. Gebelien
Attorney General of Delaware
820 N. French Street
Wilmington, Delaware 19801

State of Georgia
Arthur K. Bolton
Attorney General of Georgia
132 State Judicial Building
Atlanta, Georgia 30334

State of Hawaii
Tang S. Hong
Attorney General of Hawaii
State Capitol
Honolulu, Hawaii 96813

State of Idaho
David H. LeRoy
Attorney General of Idaho
State House
Boise, Idaho 83720

State of Illinois
Tyrone C. Fahner
Attorney General of Illinois
160 North LaSalle Street
Chicago, Illinois 60601

State of Indiana
Linley E. Pearson
Attorney General of Indiana
219 State House
Indianapolis, Indiana 46204

State of Kansas
Robert T. Stephan
Attorney General of Kansas
2nd Floor, Kansas Judicial Cntr.
Topeka, Kansas 66612

State of Louisiana
William J. Guste, Jr.
Attorney General of Louisiana
7th Floor
2-3-4 Loyola Building
New Orleans, Louisiana 70112

State of Missouri
John Ashcroft
Attorney General of Missouri
P.O. Box 899
Jefferson City, Missouri 65102

State of Nevada
Richard H. Bryan
Attorney General of Nevada
Heroes Memorial Building
Capitol Complex
Carson City, Nevada 89710

State of Nebraska
Paul L. Douglas
Attorney General of Nebraska
State Capitol
Lincoln, Nebraska 68509

State of New Jersey
John J. Degnan
Attorney General of New Jersey
State House Annex, Second Floor
Trenton, New Jersey 08625

State of North Carolina
Rufus L. Edmisten
Attorney General of
North Carolina
P.O. Box 629
Raleigh, North Carolina 27602

State of North Dakota
Robert O. Wefald
Attorney General of
North Dakota
State Capitol
Bismarck, North Dakota 58505

State of Ohio
William J. Brown
Attorney General of Ohio
State Office Tower
30 E. Broad Street
Columbus, Ohio 43215

State of Pennsylvania
Leroy S. Zimmerman
Attorney General of
Pennsylvania
16th Floor, Strawberry Sq.
Harrisburg, Pennsylvania 17120

State of Rhode Island
Dennis J. Roberts, II
Attorney General of Rhode Island
72 Pine Street
Providence, Rhode Island 02903

State of South Carolina
Daniel R. McLeod
Attorney General of
South Carolina
Wade Hampton Office Bldg.
P. O. Box 11549
Columbia, South Carolina 29211

State of South Dakota
Mark V. Meierhenry
Attorney General of
South Dakota
State Capitol
Pierre, South Dakota 57501

State of Texas
Mark White
Attorney General of Texas
Capitol Station
P. O. Box 12548
Austin, Texas, 78711

State of Washington
Ken Eikenberry
Attorney General of Washington
Temple of Justice
Olympia, Washington 98504

State of West Virginia
Chauncey H. Browning, Jr.
Attorney General of
West Virginia
State Capitol
Charleston, W. Virginia 25305

State of Wyoming
John D. Troughton
Attorney General of Wyoming
123 State Capitol
Cheyenne, Wyoming 82202

ADDENDUM:

The following states, in addition to those listed on the cover and in Appendix A, have joined in the brief.

State of Mississippi
Bill Allain
Attorney General
P. O. Box 220
Jackson, Mississippi

State of Montana
Michael T. Greely
Attorney General
State Capitol
Helena, Montana 54601

State of Wisconsin
Bronson C. LaFollette
Attorney General of Wisconsin
114 East, State Capitol
Madison, Wisconsin 53702